A NEW DEVELOPMENT IN THE APPLICATION OF EXTRA-TERRITORIAL LAW TO EXTRA-TERRITORIAL MARINE TORTS.

THE Supreme Court of the United States decided at its October Term, 1907, two significant cases of collision on the high seas. These decisions are another step in the application of extra-territorial law to extra-territorial marine torts. They were the case of the American steamer "The Hamilton,"[1] in collision with another American ship, seven miles off the coast of Virginia, and the case of the French steamer "La Bourgogne,"[2] sunk by a British ship sixty miles off Sable Island.

An accurate comprehension of these decisions involves a brief consideration of the structure of the government of the United States and the relation existing between it and the governments of the component states, and also a consideration of the jurisdiction of the American courts of admiralty.

The colonies which declared their independence of England became independent sovereign states, uniting for national purposes as the United States of America under a written constitution. There is no loss of separate and independent autonomy to the states through their union under this Constitution, which in all its provisions looks to an indestructible union composed of indestructible states.[3] The federal government possesses only the powers delegated to it by this Constitution, but while its functions are circumscribed, it is sovereign and supreme in the exercise of those functions.[4] The powers which the Constitution has not delegated to the general government nor prohibited to the states are reserved by the Constitution to the individual states or to the people themselves.[5]

Hence the states are, for national purposes, united under one central authority, but outside of the realm of nationality they are

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[1] 207 U. S. 398 (Dec. 23, 1907).

[2] 210 U. S. 95 (May 18, 1908).

[3] Texas *v.* White, 7 Wall. (U. S.) 700 (1869).

[4] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819).

[5] U. S. Const., X Amendment.

as foreign to each other and as independent as if they had never entered into the federal compact.[1] It is this duality of sovereignty which has led to the embarrassment hereinafter mentioned.

Americans bear, then, a double allegiance: first, to the United States, and, secondly, to the particular state of their citizenship.[2] Each state ordains its own courts, but the judicial power of the United States is vested in one Supreme Court and in the inferior courts ordained by the Congress or National Legislature.[3] The national courts are known as the District Courts, the Circuit Courts, the Circuit Courts of Appeals, and the Supreme Court. The judges of all these courts are called Federal Judges. The power of the national tribunals is expressly extended by the fundamental law itself to "all cases of admiralty and maritime jurisdiction."[4] In other words, the national or federal courts as contradistinguished from those established by the individual states, have exclusive as well as original jurisdiction of all actions or proceedings in admiralty. Thus a state court could not take cognizance of a legal proceeding *in rem* for a collision between vessels while navigating the high seas or the inland waters of the continent, since such a proceeding is in admiralty and not at common law.[5] The particular domain of jurisdiction which we are considering belongs by constitutional grant to the courts of the nation alone. The framers of the Constitution sought in this way to attain uniformity and consistency in all maritime transactions between citizens of the several states of the Union or between citizens of any state and those of the lands beyond seas.[6]

Sir Edward Coke, appointed Chief Justice of England by the successor of Queen Elizabeth, so revered this ancient common law (*das Volksrecht, la loi commune*) that he defended it against both the Court of Chancery and the Ecclesiastical Courts, and like King Canute, hopelessly forbidding the advance of the rising tide, he combated ferociously[7] every attempt to expand the admiralty jurisdiction. Its expansion signified to him an intrusion upon the high

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[1] Buckner *v.* Finley, 2 Pet. (U. S.) 586 (1829); Seevers *v.* Clement, 28 Md. 426 (1868).

[2] U. S. Const., XIV Amendment.

[3] U. S. Const., Art. III, § 1.

[4] U. S. Const., Art. III, § 2.

[5] The Hine *v.* Trevor, 4 Wall. (U. S.) 555 (1866).

[6] The Lottawanna, 21 Wall. (U. S.) 558 (1875); Butler *v.* Boston & Savannah S. S. Co., 130 U. S. 527 (1889).

[7] Smart *v.* Wolf, 3 T. R. 323 (1789).

prerogative of the courts of the common law.[1] The Virgin Queen was the first to foresee the splendid possibilities of Britain's maritime power.[2] The reactionary tendencies set in motion by Lord Coke after her death necessarily resulted in a narrowing of the admiralty jurisdiction, which did not comport with the expanding commerce of the kingdom. The last effects of the bickerings and disputes between the advocates of the respective courts of judicature were not entirely eliminated until three centuries later, when Parliament enacted laws placing the English admiralty on its modern basis, restoring in part its ancient jurisdiction.[3]

America claims the common law of England as a proud heritage, and sacredly preserves its beneficent trial by jury as a guaranty of individual liberty.[4] But the restrictions of English common law courts upon the admiralty never applied to the colonies. Under commissions from the mother country, the admiralty jurisdiction was of the most extensive and beneficial character.[5]

And this jurisdiction as granted by the Constitution to the Federal Courts was, says Mr. Justice Story, "the jurisdiction which, collecting the wisdom of the civil law and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."[6]

Still, early American lawyers and judges, trained in the common law traditions, inherited a prejudice against a maritime court without a jury, and a predilection for a narrow field of juridical power in the admiralty.[7] America, by the grace of her freer colonial practice, the necessities of her situation, and the accelerated movement of modern thought, soon established her admiralty law more nearly in accordance with that of other maritime nations.[8]

A distinguished French commentator said that "The worst maritime code would be one which should be dictated by the separate interests and influenced by the peculiar manners of only one people."[9]

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[1] Benedict, Admiralty, § 6.

[2] Hughes, Admiralty, 3, 4.

[3] 3 & 4 Vict. c. 65 (1840); 9 & 10 Vict. c. 99 (1846); 17 & 18 Vict. c. 104 (1854); 24 & 25 Vict. c. 10 (1861); 31 & 32 Vict. c. 71; (1868).

[4] U. S. Const., VII Amendment; Maryland Declaration of Rights, Art. V.

[5] Benedict, Admiralty, § 114.

[6] De Lovio *v.* Boit, 2 Gall. (U. S.) 398–472 (1815).

[7] Benedict, Admiralty, § 7.

[8] Benedict, Admiralty, § 7; Hughes, Admiralty, 4.

[9] Jean Marie Pardessus (1772–1853).

It is a source of pride to American lawyers that the general maritime law of the world is, with slight modifications, the settled law of the United States. This law is, of course, subject to change by the national legislature, for the system is not statical, but progressive.[1]

An illustration of its flexibility is found in the rule of locality as determinative of jurisdiction. The English courts of common law had established the ebbing and flowing of the tide as the boundary of the admiralty's juridical power.[2] It was in consequence of British precedents that the Supreme Court of the United States solemnly declared eighty years ago that the American courts of admiralty had no jurisdiction whatever over contracts for the hire of seamen on a voyage upon the Missouri River above tide.[3] But a narrow rule adapted to the insular England of King James was too restrictive for a continent of vast inland seas and of great rivers, and it was soon abolished. A quarter of a century later than the Missouri River case the same court had before it a proceeding *in rem* for a collision on the tideless Lake Ontario,[4] and to the renown of American jurisprudence, adjudged the uniform admiralty and maritime jurisdiction of the United States to extend to all the public navigable lakes and rivers of the country. Thenceforth not only the main sea, but all of the navigable waters of the United States, whether landlocked or open, salt or fresh, tide or no tide, came within the jurisdiction of the admiralty.[5] In the opinion Chief Justice Taney declared that "The Union was formed upon the basis of equal rights among all the states . . . and that it would be contrary to the first principles thereof to confine these rights [*i. e.* the safety of commerce, the administration of prize law, etc.] to the states bordering on the Atlantic and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States." The march of science with its application of steam to water navigation, and the possibility thereby to navigate a vessel against an unchanging current, had foreordained the expansion of the admiralty jurisdiction.

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[1] The Lottawanna, 21 Wall. (U. S.) 558 (1875); Butler *v.* Boston & Savannah S. S. Co., 130 U. S. 527 (1889).

[2] Benedict, Admiralty, §§ 228–9.

[3] The Thomas Jefferson, 10 Wheat. (U. S.) 428 (1825).

[4] The Genesee Chief, 12 How. (U. S.) 443 (1851).

[5] Dunham's Case, 11 Wall. (U. S.) 1 (1871).

Again, as illustrating the expansive tendency, the Supreme Court had said that state legislatures have no authority to create a maritime lien,[1] but later the court sustained and enforced in admiralty a lien created by a law of Louisiana for supplies furnished to a ship at her home port, no lien therefor existing under the general maritime law, as the Congress had provided none. The states, it was held, might legislate until Congress chose to act in exercise of its constitutional power to regulate commerce.[2]

An instance of the progressive movement through remedial legislation is the statute assimilating the law of America to that long existing in continental Europe, whereby innocent shipowners can limit their liability for damages caused by their vessel to the value of their pecuniary interest in her and her freight pending,[3] and a second instance of legislation of like kind is the so-called Harter Act of February 13, 1893,[4] applicable, however, only between vessel owner and shipper. The general scheme of this statute is to make the ship liable for faults in connection with the ordinary shipment and stowage of her cargo, but to allow her exemption from liability for mere negligence in navigation or management of the vessel after the voyage has commenced.[5]

These preliminary matters considered, we pass to the civil liability in admiralty for the death of a human being, which was the concrete question in the two cases of "La Bourgogne" and "The Hamilton."

"It is a singular fact that by the common law of England the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy,"[6] or, as stated by Lord Ellenborough, "in a civil court the death of a human being could not be complained of as an injury."[7] This doctrine of substantive law had its origin in England in the technical rule of mere procedure expressed in the maxim that a personal action dies with the person: "*Actio personalis moritur cum persona.*" But the contrary legal doctrine is so well established in other European countries as to be there considered a part of the general body of the law administered by maritime nations.[8]

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[1] The Belfast *v.* Boon, 7 Wall. (U. S.) 624 (1869).
[2] The Lottawanna, 21 Wall. (U. S.) 558 (1875).
[3] 9 Stat. at L. 635 (1851).
[4] 27 Stat. at L. 445 (1893).
[5] Hughes, Admiralty, 173.
[6] Goodsell *v.* Hartford, etc., R. R. Co., 33 Conn. 51 (1865).
[7] Baker *v.* Bolton, 1 Camp. 493 (1808).
[8] Hughes, Admiralty, 198.

In Holland the right of action for death seems to have prevailed for centuries.[1] In Scotland the unwritten law permits the wife or family of a deceased person to sue for damages caused by his death.[2] The German Code of 1896 (*Bürgerliches Gesetzbuch*) expressly specifying deliberate or negligent (*vorsätzlich oder fahrlässig*) injury to life as a cause of action, is merely declaratory of the law as anteriorly ruled by the German Imperial Court of Civil Jurisdiction (*Reichsgericht in Civilsachen*).[3] The law of Austria confers the right of recovery upon the widow and children of the deceased.[4] In France the Marine Ordinance of Louis XIV (1681) did not mention the subject, but it is thoroughly settled by judicial interpretation of the Code Napoléon that there is a right of action for death thereunder, although the Code itself does not refer expressly to the killing of a human being. Its provision in general language requires reparation for every act of man which causes injury to another, whether produced by the defendant, his agent or anything which the defendant has in charge.[5] The Code of Italy, literally translating and re-enacting this language, has been similarly expounded, and it has been decided that the surviving relative who sues need not even show the share which he had in the deceased's earnings.[6] This principle of the Italian law is in marked contrast to the principle underlying Lord Campbell's Act and its American prototypes hereinafter mentioned. They permit the recovery of compensation for direct pecuniary loss

[1] Grotius, Book 3, c. 33 (Herbert ed., London, 1845).

[2] Bell, Comm. (1872) § 2029; Clarke *v.* Coal Co., App. Cas. 412 (1891).

[3] Bürgerliches Gesetzbuch vom 18. August, 1896 (Munich, 1906). Sec. 823. "Wer vorsätzlich oder fahrlässig, das Leben, den Körper, die Gesundheit, die Freiheit, das Eigenthum oder ein sonstiges Recht eines Anderen, widerrechtlich verletzt, ist dem Anderen zum Ersatze des daraus entstehenden Schadens verpflichtet." Entscheidungen des Reichsgerichts in Civilsachen, Vol. 7, p. 139 (1882).

[4] Das allgemeine bürgerliche Gesetzbuch für das Kaiserthum Oesterreich (Vienna, 1873). Sec. 1327. "Erfolgt aus einer körperlichen Verletzung der Tod, so müssen nicht nur alle Kosten, sondern auch der hinterlassenen Frau und den Kindern des Getödteten das, was ihnen dadurch entgangen ist, ersetzt werden."

[5] Code Napoléon. Sec. 1382. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer." Sec. 1384. "On est responsable non-seulement du dommage que l'on cause par son propre fait, mais encore, de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses, que l'on a sous sa garde."

[6] Codice Civile del Regno d' Italia (Florence, 1905, annotated). Sec. 1151. "Qualunque fatto dell 'uomo che arreca danno ad altri, obbliga quello per colpa del quale è avvenuto, a risarcire il danno." Sec. 1153. "Ciascuno parimente è obbligato non solo pel danno che cagiona per fatto proprio, ma anche per quello che viene arrecato col fatto delle persone delle quali deve rispondere, o colle cose che ha in custodia."

only.[1] The law of Switzerland concerning civil indemnity for death is as specific as that of Germany; the Statute of Belgium is a reproduction of that of France, and the Codes of Spain and Portugal contain a general provision requiring reparation for every damage caused to others or their rights.[2]

On August 26, 1846, Parliament abrogated the ancient rule of the English realm and gave a civil right of action for death.[3] Similar legislation creating personal responsibility has followed in most of the American States.[4] The House of Lords, it is true, has held the terms of the English statute inapplicable to suits *in rem* in the admiralty,[5] but it seems to apply to proceedings *in personam* in that court,[6] although foreigners are probably excluded from its benefits.[7]

But prior to this legislation the common law of England, as already explained, denied the recovery for death. The numerous authorities on the point are so uniform that the United States Supreme Court has said that it is impossible to speak of the question as open.[8] Unless changed by statute, this archaic law still prevails everywhere in the United States excepting perhaps in Louisiana.

And although the "admiralty may be styled, not improperly, that human providence that watches over the rights and interests of those who go down to the sea in ships and do their business on the great waters," [9] no controlling authority could be found by the Supreme Court to make the rule of the general maritime law of America different in this respect from that of the common law.[10]

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[1] Pym *v.* Great Northern Ry., 2 B. & S. 759 (1862); Coughlan's Case, 24 Md. 84 (1866).

[2] Code Fédéral des Obligations (Berne, 1881). Sec. 50. "Quiconque cause sans droit un dommage à autrui, soit à dessein, soit par négligence ou par imprudence, est tenu de le réparer." Sec. 52. ". . . Lorsque, par suite de la mort, d'autres personnes sont privées de leur soutien, il y a également de les indemniser de cette perte." Codes Belges LIV; III; Tit. IV, Secs. 1382 and 1384 (Brussels, 1902). El Código Civil Vol. 2, Art. 1902 (Madrid, 1896). "El que por acción ú omision causa daño á otro, interviniendo culpa ó negligencia, está obligado á reparar el daño causado." Codico Civil Portuguez, Parte IV, Livro 1, Titulo 1 (Lisbon, 1892).

[3] 9 & 10 Vict., c. 93 (1846).

[4] *E.g.*, Md. Code Pub. Gen. Laws, Art. 67, Statute enacted 1852.

[5] The Vera Cruz, 10 App. Cas. 59 (1884); The Corsair, 145 U. S. 335 (1892).

[6] The Bernina, 13 App. Cas. 1 (1888).

[7] Adam *v.* The British & Foreign S. S. Co. Ltd., [1898] 2 Q. B. 430.

[8] Mobile Life Ins. Co. *v.* Brame, 95 U. S. 754 (1878).

[9] The Highland Light, Chase's Dec., 150 (1867).

[10] The Harrisburg, 119 U. S. 199 (1886).

Thus for many years it had been indisputably settled that in the absence of legislation no suit could be maintained in admiralty to recover damages for the death of a human being caused by negligence. And so stood the maritime law of the American courts when "La Bourgogne" and "The Hamilton" cases were finally adjudicated on appeal.

It is perfectly obvious that the federal Congress might pass a bill providing for the recovery of such damages for death under its power to regulate commerce with foreign nations and among the several states, and in pursuance of the constitutional provision extending the judicial power of the government to "all cases of admiralty and maritime jurisdiction,"[1] but until the decision in the case of "The Hamilton" on December 23, 1907, no ruling had been made by the Supreme Court determining whether a single state could by statute create such a liability enforceable in the admiralty. The Supreme Court had indeed twenty years ago expressly declined to give an opinion upon the point,[2] and diverse rulings as to the power of a state had ensued in the lower courts. One federal judge in a case *in rem* where reliance had been placed by the libellant on the death statute of Pennsylvania, had gone so far as to say that if the state statute undertook to give a lien in case of death, he would declare it inoperative.[3] And another judge had held, when considering a case *in rem* under the Virginia statute, which then only provided a remedy *in personam*, that a state could not create a maritime right or confer jurisdiction in any particular upon an admiralty court.[4] But other judges had sustained state statutes and by virtue thereof had enforced liens in admiralty — in one instance even where the law did not purport to give a lien.[5]

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[1] U. S. Const., Art. I, § 8; Art. III, § 2.

[2] Butler *v.* Boston & Sav. S. S. Co., 130 U. S. 527 (1889).

[3] The North Cambria, 40 Fed. 655 (Butler, J.) (1889).

[4] Hughes, J., in The Manhassett, 18 Fed. 918 (1884); Holmes *v.* O. & C. Ry. Co., 5 Fed. 75 (1880), *in personam*.

An amendment of the Virginia statute now expressly permits the filing of a libel *in rem* against the offending ship. 2 Va. Code, Annotated (1904), § 2902; and the United States Circuit Court of Appeals for the Fourth Circuit enforced this statutory lien *in rem* in the admiralty where the tort had occurred on territorial waters of the state. The Glendale, 26 C. C. A. 500 (1897).

[5] The Oregon, 45 Fed. 62 (1891), enforcing *in rem* the Oregon statute which provides that every boat or vessel used in navigating the waters of the State of Oregon shall be liable and subject to a lien for damages or injuries done to persons or property by such boat or vessel. Oregon Code (Comp. 1902), § 5706.

The Garland, 5 Fed. 924 (1881), upholding the Michigan statute in a suit *in rem*, although statute gives no lien.

In this chaos of contrary rulings the Hon. Addison Brown, a most experienced judge, then presiding in the United States District Court for the Southern District of New York, had, in an opinion of notable perspicacity and erudition, reviewed the precedents and enforced the New York death statute under a libel *in personam* where the tort had occurred on the navigable waters of the state.[1] And similarly, the Hon. William H. Taft, then a Circuit Judge, delivered the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, applying the death statute of the Dominion of Canada in a proceeding *in personam* where a collision had occurred upon Canadian waters.[2] These two cases, it will be observed, were instances of torts on strictly territorial waters, and the application of the local law was made by the court only thereto, but not to the high seas. By contrast, where the tort had occurred on the ocean, the federal courts sitting in Illinois refused to enforce the law of France in suits *in personam* arising out of the sinking of "La Bourgogne."[3] The argument was rejected in Illinois that the cause of action must be considered to have arisen within the French territorial jurisdiction. In this condition of the adjudications the Hamilton case[4] reached the Supreme Court of the United States. The suit arose out of proceedings to limit liability taken in the United States District Court at New York. The owners of the colliding vessels were both corporations of the State of Delaware. Each ship had its home port in that state. The collision occurred at sea off the coast of Virginia. Both vessels were held at fault by the District Court, the Circuit Court of Appeals, and the Supreme Court, successively.[5] Eight persons (*i. e.*, five passengers and three mariners) were drowned in the disaster. There was no pretense that any of them had been negligent, and their representatives, unable to recover damages by the law of the flag, sought relief under the statute of the particular state where the ships happened to be domiciled. The statute, after enacting that actions for injuries to the person shall not abate by reason of the plaintiff's death, provides that, "whenever death shall be occasioned by unlawful violence or negligence, and no suit has been brought by the party injured to recover damages during his or her life, the widow

[1] The City of Norwalk, 55 Fed. 98 (1893).

[2] Robinson *v.* Det. & C. Steam Nav. Co., 20 C. C. A. 86 (1896).

[3] Ruddell *v.* Compagnie Générale Transatlantique, 94 Fed. 366 (1899), and 100 Fed. 655 (1900).

[4] 207 U. S. 398 (1908).

[5] 134 Fed. 95 (1904); 146 Fed. 724 (1906); 207 U. S. 398 (1907).

or widower of any such deceased person, or if there be no widow or widower, the personal representatives may maintain an action for and recover damages for the death and loss thus occasioned."[1]

The libellants contended that the ships, although actually on the high seas, were still constructively portions of the territory of the state of Delaware, and subject to her laws. Counsel for the shipowner urged, with much force and cogency of reasoning, that the relation of the parties should not in admiralty be regarded as fixed by the laws of a particular state when the injury occurs on the open sea, through a purely marine tort, and that the federal courts of America should in admiralty decide the liability for wrongs committed outside of territorial waters by the rules of admiralty as administered by the federal forum, which forum gives no damages for death. And it was further urged that no state can by legislation destroy the very symmetry of the maritime law of the Union, to preserve which was a controlling reason for conferring on the general government exclusive jurisdiction in admiralty.

But notwithstanding the argument at the bar, the doubt expressed by the court twenty years before in the case of Butler *v.* Boston & Savannah S. S. Co.[2] was now finally resolved by the Supreme Court in favor of the validity of the Delaware statute, and it was further held that the Act was not confined to deaths occasioned on land, but that it created an obligation for deaths occasioned at sea which could be enforced in admiralty. And thus the operation of the rule under which Judge Brown had merely applied the New York statute to the strictly territorial waters of that state, and under which Judge Taft had only enforced the Canada statute on the strictly territorial waters of the Dominion, was now extended by the Supreme Court to the ocean itself; and the Delaware statute was there applied by the fiction that her ships were legally still a part of Delaware territory although they were actually on the high seas of all nations. The court said further that the result of a state statute giving a proceeding *in personam* would not be the creation of different laws for different federal districts. The liability would be recognized in all. Nor would this create any lack of uniformity. Courts constantly enforce rights arising from and depending on other laws than those governing the local transactions of the jurisdictions in which they sit. But the court carefully added that

[1] Act of Jan. 26, 1886, as amended by Act of March 9, 1901. Del. Laws, 1901, vol. 31, p. 500.

[2] 130 U. S. 527 (1889).

it was not concerned with these considerations in the case before it. The legislation of the United States has enabled the owner to transfer his liability to a fund and to the exclusive jurisdiction of the admiralty, and he had elected to do so. That fund being in course of distribution, "all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not," since the federal statute allows the liability to be asserted and proved against the fund.

The views thus expressed in the Hamilton case were inevitably followed by the enforcement of the law of France in the case of "La Bourgogne." That vessel was, as already stated, sunk in collision by a British ship on the high seas sixty miles off Sable Island. Most of her passengers, her captain, and other principal officers and many of the crew went down with her. The case, like the Hamilton case, came before the Supreme Court upon proceedings taken by the shipowner himself to limit liability. The value of the surrendered property, consisting of life boats and life rafts, was supposed not to exceed $100, while the total claims presented aggregated more than $2,000,000. Many death claims figured in the list. While "La Bourgogne" was held liable for the single fault of proceeding too fast in a fog, no privity or knowledge was proven on the part of La Compagnie Générale Transatlantique, and the company's right to limit liability was sustained. The total fund for distribution consisted of the life boats and rafts, plus freight and passage money prepaid for the voyage from New York to Havre, aggregating in all less than $23,000.

The ultimate decision in the case of "La Bourgogne" might, in view of the prior evolution of the maritime law already noted, have been reasonably anticipated. In fact Mr. C. Philip Wardner of the Boston Bar had forecast the result of the litigation in an able critique of the earlier and contrary rulings in Illinois concerning the same collision.[1]

The Supreme Court in that case had applied the well-known doctrine of the law of the flag to a tort on the high seas. But in the Hamilton case it was not the law of a foreign power but the law of a particular state of the American Union which was applied to a tort similarly committed. The vessels registered in Delaware carried the flag of the United States of America and not the flag of Delaware. The two ships involved in the collision were bound,

[1] 21 Harv. L. Rev. 1–22, 75–91.

one from a port of New York to a port of Virginia, and the other from a port of Virginia to a port of Pennsylvania, and consequently were engaged in commerce among the several states. The legal embarrassment is apparent, arising from the duality of sovereignty in the American government. As already shown, the several states are on the one hand mere integral parts of an entire domain constituting the United States of America, and have ceded to the central authority an absolute and exclusive jurisdiction in admiralty. On the other hand, they have retained as independent sovereignties a jurisdiction over the unceded or unprohibited areas of governmental power. And thus Delaware has been treated by the Supreme Court as a sovereign entity legislating for an American ship while on the high seas, because the vessel was registered in a port of Delaware and would by legal fiction remain everywhere a part of her territory. But even if we are persuaded of the correctness of the decision in the case of the Hamilton, the present situation is anomalous, and the principles enunciated if applied to support an independent action brought by the personal representatives of the deceased against a ship or owner to recover for death, may lead to great difficulties and certainly to unsatisfactory results, unless Congress enacts a general death statute.

In 1875 the Supreme Court declared that the "Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country; that it could not have been the intention to place the rules and limits of the maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." The court further said that it would undoubtedly be far more satisfactory to have a uniform law regulating such liens.[1]

Delaware, the first state to adopt the Constitution of the United States, undoubtedly surrendered to the courts of the federal government exclusive jurisdiction in admiralty, and to the federal Congress the power to regulate commerce with foreign nations and among the several states. To say, then, that an individual state, like Delaware, may, in the absence of paramount legislation by Congress, regulate the rights of those who travel on the high

[1] The Lottawanna, 21 Wall. (U. S.) 558 (1875).

seas in American ships registered at her ports, is indeed an anomalous, even if it be, as it probably is, a necessary, sequence to earlier decisions. The law of the sea is of universal obligation. No single nation, certainly not a single state, should be allowed to create obligations for the world.[1] "Everywhere the sea's the sea." Πᾶσα θάλασσα θάλασσα, said the old Greek.

Looking to the future, it would perhaps have been more fortunate for the court of last resort to adhere to its own law, the law of the admiralty forum, and to deny to the representatives of those killed in the collision the damages which could not be recovered under the general maritime system, but only by the special statute of Delaware. Congress could then have changed the legal rule.

From the foregoing it is apparent that there is no present right of recovery for loss of life by negligence on the high seas, either by the general maritime law of the United States or by federal statute. It is now also settled by the Hamilton and La Bourgogne cases, that if the owner of an offending ship surrenders the remains of his property with freight pending in order to limit his liability, persons entitled to an action by reason of the death of their decedent under the law of the ship's flag or domicile, will be allowed, upon being brought into court, to participate in the distribution of the fund. But on the other hand it has not yet been determined by the Supreme Court in a case of death on the high seas, that a lien created upon the ship itself by a statute of one of the American states will be enforced in admiralty, nor has it been expressly decided by that court that an action *in personam* will lie in the admiralty under a statute of the state of the ship's domicile. What may be the next step in the development of the law does not yet appear. Even if the same rule should prevail in direct suits as under the shipowner's petition to limit liability, the court may find it difficult to decide what law to apply in a collision at sea between two American vessels. For instance, where one is registered in Maryland, with its broad death statute, and the other is registered in a state whose statute obviously applies only to torts on land. Or, to take another illustration: The Code of Delaware authorizes recovery on behalf of any next of kin, whereas the Code of Maryland permits no recovery whatsoever for beneficiaries other than husband or wife, children or parent of the deceased. What law would an American court of admiralty now

[1] The Scotia, 14 Wall. (U. S.) 170 (1872).

apply in a case of collision at sea resulting in the death of a man leaving only collateral next of kin for whom suit could not be brought under the law of Maryland? Or what would be the maximum recovery where the statute of one state fixed no amount (*e. g.*, Maryland) and the statute of the other state (*e. g.*, Virginia, New York, or Oregon) prescribed an absolute limit?

The Maritime Law Association of the United States has for years sought to procure the passage of an Act for the federal courts which would eliminate these difficulties, and in 1903 it prepared and submitted such a bill to Congress.[1] No definite action in reference to it has yet been taken by the National Legislature, but it is to be hoped that Congress may speedily grant the right of civil redress in death cases provided by Lord Campbell's Act and the Continental Codes. A private remedy for the negligent deprivation of life, existing throughout Western Europe and in most of the American states, as well as in the federal District of Columbia,[2] it behooves the United States in their national capacity to assimilate their law to the European law and that of the component states of the Union.[3]

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[1] See Appendix.

[2] Code of District of Columbia (1901), §§ 1301–2.

[3] BILL PROPOSED BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES.

AN ACT TO AUTHORIZE THE MAINTENANCE OF ACTIONS FOR NEGLIGENCE CAUSING DEATH IN MARITIME CASES.

BE IT ENACTED THAT:

SECTION 1. Whenever an action, whether *in rem* or *in personam*, might have been maintained by any injured party, had death not occurred, to recover damages for personal injury happening to such person on the high seas, the Great Lakes, or any navigable waters of the United States, or if happening to any of the passengers or crew on board of any vessel of the United States, then in whatsoever waters such vessel may have been at the time of such injury, such injury in every such case having been caused by the wrongful act, neglect, or default of another and though amounting to a felony, then, if such personal injury shall result in the death, whether on land or water, of the person injured, an action *in rem* or *in personam* as may be appropriate, may be brought for the exclusive benefit of the deceased's husband, wife, or next of kin, by the personal representatives of the deceased against the vessel foreign or domestic or the persons that would have been liable to the deceased if death had not occurred. And in such action such personal representatives may recover such damages as shall be fair and just compensation, with reference to the pecuniary damages resulting from such injury and death to the deceased's husband, wife or next of kin, severally, not exceeding in all the sum of $5,000, to be apportioned among them at the trial, according to the pecuniary damages severally sustained by them, provided, however, that such action, if *in rem*, shall be brought within one year, or if *in personam*, within two years, after the decedent's death; but if the vessel or the

It is true that the American courts of admiralty have, without the aid of a statute, found in several instances of death, the means of preventing the injustice which would have followed an adherence to the law of the admiralty forum, for the paramount and universal law "laid up in the bosom of God," upholds the sanctity of human life. Justice, the great interest of mankind on earth, is the ligament which binds the civilized nations together.[1] It knows no distinction of nationality, of time, or of place. Its universality, its duration, and its immutability are thus portrayed in the lofty words of the greatest of Roman orators: "Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnis gentis, et omni tempore, una lex, et sempiterna et immutabilis continebit."[2]

George Whitelock.

BALTIMORE.

SUPPLEMENTAL NOTE. — The recent collision at sea between the British steamship Republic and the Italian steamship Florida further emphasizes the importance of Federal legislation concerning damages for death by negligence.

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persons liable be absent from the United States at the time of such death, the periods above limited for the commencement of the action against them respectively shall be counted from the time of the first presence of such vessel or persons within the United States affording reasonable opportunity for service of process upon them after such injured person's death.

SECTION 2. If at the decedent's death, any action brought by him to recover damages for such injuries be pending and undetermined, such action shall proceed no further, except that his personal representatives may at their option on petition to the Court and upon such notice to the defendant as the Court may direct, be substituted as plaintiffs in that action, and such amendment of pleadings be made as the Court may direct, and the action may on order of the Court thereafter proceed for the recovery of damages pursuant to this Act, and not otherwise; if final judgment on the merits has been rendered in the deceased's lifetime in any action brought by him for such injuries, such judgment shall be a bar to any other action therefor, except for the enforcement of such judgment.

Except as in this Section provided no other action than that given by the preceding Section shall be maintained by reason of such injuries.

SECTION 3. This Act shall not abridge the rights of shipowners and others to avail themselves of the provisions of Sections 4282, 4283, 4285, 4286 and 4287 of the Revised Statutes of the United States, and Acts amendatory thereof and additional thereto relating to limitations of liability; nor the right of suitors to a remedy *in personam* in the Courts of the several States and elsewhere, for the recovery of damages under this Act, against any person or corporation liable therefor.

SECTION 4. In any action brought under this Act, negligence or contributory negligence of the decedent shall have the same effect as to the damages recoverable as if the action were an action brought by the injured person, but the damages are not in any case to exceed the limit above provided.

[1] Webster's Address on Story.

[2] Cicero, De Re Publica, III, 28–33 (Tauchnitz, Leipzig, 1865, p. 214).

The claimant of the Florida has instituted limited liability proceedings in the United States District Court for the Southern District of New York. It may be assumed under the doctrine of La Bourgogne that the existence *vel non* of negligence causing the collision will be determined according to American legal standards. No damages for the death of the victims being recoverable under the general maritime law of America, the representatives of those killed must rely on law foreign to the forum. If the Florida is held at fault, valid death claims would seem entitled to participate in the distribution of the fund arising from the sale of that vessel. But the general right to participation will depend upon the Code of Italy, and not upon the maritime law of the United States. If, on the other hand, the Republic is held liable for the collision, and her owner seeks to limit liability, it is an interesting question as to what law, if any, can be invoked to sustain the death claims, and whether or not persons other than British citizens are excluded from the benefits of the English death enactment.

G. W.